COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2332 **Cir. Ct. No. 2003CV678**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DENNIS EARL BARNES,

PLAINTIFF-APPELLANT,

V.

SAUK COUNTY, SAUK COUNTY SHERIFF'S DEPARTMENT, SAUK COUNTY JAIL, RANDY STAMMEN, CAPTAIN HAFEMANN, SRG. MARY WARD, NURSE MARGO, NURSE KATHY, BRIAN J. BOHLMANN, M.D. AND HEALTH PROFESSIONALS LTD.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Dennis Earl Barnes appeals a judgment dismissing his 42 U.S.C. § 1983 claim against Sauk County, Dr. Brian Bohlmann and his clinic, and several Sauk County individuals or departments. Barnes alleged that the defendants deprived him of needed medical care while he was an inmate in the Sauk County Jail and thereby violated the Eighth Amendment prohibition against cruel and unusual punishment. The issue on appeal is whether the circuit court properly granted summary judgment to the defendants. We affirm.

¶2 The alleged constitutional violations occurred August 20, 2002 to November 5, 2002, and February 18, 2004 to March 23, 2004. During both periods Barnes was a Sauk County Jail inmate. He alleged that during both periods the defendants acted with deliberate indifference to his chronic back pain and hepatitis C condition. Specifically, he alleged that during the first period Sauk County Jail personnel deprived him of needed medication for his back pain until he was allowed to see a physician on November 5, 2002, and during the second period he received no medication or treatment for either pain or hepatitis because Dr. Bohlmann refused to provide any at a February 18, 2004 examination.

¶3 To establish a constitutional violation based on inadequate or withheld medical treatment, the plaintiff must prove deprivation of medical treatment for a serious medical need, and the defendant's deliberate indifference to that need. ***Santiago v. Leik***, 179 Wis. 2d 786, 793, 508 N.W.2d 456 (Ct. App. 1993). A "serious medical need" is a condition "sufficiently serious or painful to make the refusal of assistance uncivilized." *See* ***Cody v. Dane County***, 2001 WI App 60, ¶10, 242 Wis. 2d 173, 625 N.W.2d 630. "Deliberate indifference" constitutes the unnecessary and wanton infliction of pain. ***Leik***, 179 Wis. 2d at 793, quoting ***Estelle v. Gamble***, 429 U.S. 97, 104 (1976). It suggests "an act so dangerous that the defendant's knowledge of the risk [of harm resulting from the

act] can be inferred." ***Cody***, 242 Wis. 2d 173, ¶10, quoting ***Duckworth v. Franzen***, 780 F.2d 645, 652 (7th Cir. 1985).[1]

¶4 The proofs in support of summary judgment showed jail personnel making numerous efforts to address Barnes' medical needs after he entered the jail on August 20, 2002, including contacts with his treating physicians to obtain records and prescription medication. There was also evidence that Barnes refused to cooperate with some of the efforts to address his needs and that part of the delay in obtaining medication was attributable to Barnes' wife.

¶5 In support of his summary judgment motion, Dr. Bohlmann attested that he did not diagnose any physical condition requiring pain medication during the consultation on February 18. He further explained that he was concerned about the effect of narcotic medication on Barnes' mental health. As for treating Barnes' hepatitis, the doctor explained that Barnes did not show symptoms of an advanced case that required immediate treatment. He also gave his professional opinion that most hepatitis C patients do not receive treatment and the recovery rate is poor for those who do receive treatment. He added that the standard treatment has such severe side effects that most patients do not complete the treatment program. He also explained that he was familiar with the policies of several county jails in Wisconsin and none provided hepatitis treatment to inmates.

¶6 In his opposing affidavit Barnes described Dr. Bohlmann as angry and hostile and stated that Dr. Bohlmann told him that he would not receive treatment because there was no medical emergency. It is undisputed that Dr.

[1] ***Haley v. Gross***, 86 F.3d 630, 644 n.34 (7th Cir. 1996), recognized the abrogation of ***Duckworth v. Franzen***, 780 F.2d 645, 653 (7th Cir. 1985) on grounds not relevant to this appeal.

Bohlmann stopped Barnes' prior pain medication, Ibuprofen, because Barnes complained about its side effects.

¶7 The circuit court concluded that the evidence allowed no inference that would support an Eighth Amendment claim, and Barnes has appealed.

¶8 On summary judgment review we apply the same standards as the circuit court, and owe no deference to its decision. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is appropriate if no genuine issue of material fact remains, and the moving party is entitled to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984); WIS. STAT. § 802.08(2) (2003-04).[2]

¶9 The circuit court properly granted summary judgment on the claim relating to August 20 - November 5, 2002. The affidavits and exhibits provide evidence that jail personnel made repeated efforts to get records and pain medications from physicians who had treated Barnes. Jail personnel also cooperated with the effort of Barnes' family to provide him with medication. Barnes offered no evidence that creates a material factual dispute regarding these efforts. Nor did Barnes offer evidence to dispute the evidence that attributed a substantial part of the delay in obtaining treatment to Barnes' physicians, his wife, and Barnes himself because he never followed jail procedures for requesting treatment and made no complaints or requests of any kind between September 9, 2002 and October 8, 2002. This undisputed evidence precludes an inference that

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the defendants were deliberately indifferent to Barnes' medical needs during the time in question. At best, the evidence might allow an inference of negligence on the part of jail personnel, but negligence is not equivalent to deliberate indifference. *See* ***Farmer v. Brennan***, 511 U.S. 825, 835-38 (1994).

¶10 The circuit court also properly granted summary judgment on the claim relating to February 18 – March 23, 2004. Dr. Bohlmann contends that the "professional judgment" standard applies to Eighth Amendment claims of inadequate medical treatment, under which liability is imposed "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." ***Youngberg v. Romeo***, 457 U.S. 307, 323 (1982). In fact, this is a higher standard of care than the deliberate indifference standard for prisoners' Eighth Amendment claims. *See* ***Kara B. v. Dane County***, 205 Wis. 2d 140, 159-60, 555 N.W.2d 630 (1996). However, even under the higher standard, summary judgment is appropriate. Dr. Bohlmann's explanation of his decision not to treat Barnes is evidence that he applied his professional judgment in his decision and did not depart from accepted practice. Consequently, to establish a material fact dispute Barnes needed to present evidence showing that the accepted medical practice essentially required treatment for his hepatitis and for his subjective pain complaints. He provided no such evidence. Therefore, even accepting as true his description of Dr. Bohlmann's demeanor at the February 18 appointment, Barnes' proofs do not create a reasonable inference that Dr. Bohlmann's treatment decision violated the Eighth Amendment prohibition.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.